Supreme Court, U.S.
FILED
DEC 9 1992
OFFICE OF THE CLERK

(2)

No. 92-658

In the Supreme Court of the United States

OCTOBER TERM, 1992

G. FRANKLIN LATHAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

12 pp

QUESTION PRESENTED

Whether the court of appeals lacked jurisdiction to review petitioner's interlocutory appeal from the denial of his post-trial motion for a judgment of acquittal.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Abney v. *United States*, 431 U.S. 651 (1977)	5
Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)	5
Justices of Boston Municipal Court v. *Lydon*, 466 U.S. 294 (1984)	6
Midland Asphalt Corp. v. *United States*, 489 U.S. 794 (1989)	4, 5
Richardson v. *United States*, 468 U.S. 317 (1984)	5, 6
United States v. *Greene*, 834 F.2d 86 (4th Cir. 1987)	8, 9
United States v. *MacDonald*, 435 U.S. 850 (1978)	5
United States v. *Szado*, 912 F.2d 390 (9th Cir. 1990)	7, 8
United States v. *Wood*, 958 F.2d 963 (10th Cir. 1992)	6, 7

Constitution, statutes and rules:

U.S. Const. Amend. (Double Jeopardy Clause)	5, 6
18 U.S.C. 287	2, 3
28 U.S.C. 1291	4
Fed. R. Crim. P.:	
Rule 29(c)	2
Rule 33	2

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-658

G. FRANKLIN LATHAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1-A2) is unpublished, but the judgment is noted at 968 F.2d 15 (Table).

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1992. The petition for rehearing was denied on July 8, 1992. Pet. App. D1-D2. The petition for a writ of certiorari was filed on October 6, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on five counts of making false claims to the United States government, in violation of 18 U.S.C. 287. Following the verdict, petitioner filed a motion for a judgment of acquittal under Fed. R. Crim. P. 29(c), or, in the alternative, for a new trial under Fed. R. Crim. P. 33. The district court denied the motion for a judgment of acquittal but granted the motion for a new trial. Pet. App. B1, C1-C84. The government appealed from the new trial order and petitioner cross-appealed from the denial of the motion for a judgment of acquittal. The court of appeals dismissed petitioner's appeal for lack of appellate jurisdiction and summarily affirmed the new trial order. Pet. App. A1-A2; 968 F.2d 15 (Table).

1. The evidence at trial showed that petitioner served as a controller for the United States Agency for International Development (AID) in San Salvador, El Salvador. In addition to their salaries, AID employees are entitled to payments or allowances as provided by the State Department's Standardized Regulations. At the relevant time, the Regulations provided for a special allowance in the event of the emergency evacuation or authorized departure of an AID employee or his dependents from El Salvador for military or other reasons of national interest or because of imminent danger to their lives. Pursuant to the regulations, an AID employee could be paid for any direct expenses incurred as a result of his evacuation or that of his dependents. Such direct added expenses from evacuation included a subsis-

tence expense allowance for a period of up to 180 days after the evacuation. Pet. App. C3-C4.

In the fall of 1987, while petitioner was working for AID in San Salvador, his son Stephen was attending college in Philadelphia, Pennsylvania. On November 25, 1987, Stephen traveled from Philadelphia to San Salvador to spend Thanksgiving with his father. On December 1, 1987, Stephen returned to Philadelphia. Stephen used a prepaid round trip airline ticket to travel to and from El Salvador. Pet. App. C4-C5.

On five occasions between February 26 and August 11, 1988, petitioner submitted travel vouchers and supporting documentation to AID claiming entitlement to direct added expenses for subsistence associated with the departure of his son from El Salvador. Petitioner knew that such expenses were not compensable under the Standardized Regulations. As a result of petitioner's false claims, the government paid $6,852.34 into petitioner's account at a New Jersey bank. Pet. App. C5-C6.

2. Following the verdict, petitioner moved the district court for either a judgment of acquittal or a new trial. In support of his acquittal motion, petitioner argued that the evidence was insufficient to show that (1) the documents he submitted to AID were "claims" within the meaning of 18 U.S.C. 287; (2) his request for special allowances in connection with his son's departure from El Salvador was false; or (3) he knew that the claims were false. The district court rejected those arguments and denied the motion for acquittal. Pet. App. C42-C58.

The district court granted petitioner's motion for a new trial. The court concluded that it had committed

plain error in failing to instruct the jury on the contents and meaning of the Standardized Regulations, which were admitted into evidence at trial. The court reasoned that such an instruction was necessary because "the Standardized Regulations gave rise to the controlling law of the case, and because the terms used in the Regulations are not within the realm of common understanding." Pet. App. C64.

3. The government appealed from the new trial order, and petitioner cross-appealed from the denial of his motion for judgment of acquittal. The court of appeals dismissed petitioner's cross-appeal for lack of appellate jurisdiction, Pet. App. A1-A2, and affirmed the order granting petitioner a new trial, 968 F.2d 15 (Table).

ARGUMENT

Petitioner contends (Pet. 12-32) that the court of appeals erred in dismissing his cross-appeal from the denial of his post-trial motion for judgment of acquittal. That claim merits no further review.

The courts of appeals "have jurisdiction of appeals from all final decisions of the district courts * * * except where a direct review may be had in the Supreme Court." 28 U.S.C. 1291. In criminal cases, a final judgment is not entered "until after conviction and imposition of sentence." *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 798 (1989). Because the district court granted petitioner's motion for a new trial, a final judgment has not yet been entered in this case.

This Court has recognized "a narrow exception to the normal application of the final judgment rule, which has come to be known as the collateral order

doctrine." *Midland Asphalt Corp.*, 489 U.S. at 798; see *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Applying that doctrine, the Court has held that a defendant may take an interlocutory appeal from the denial of a "colorable" double jeopardy claim. *United States* v. *MacDonald*, 435 U.S. 850, 862 (1978); *Abney* v. *United States*, 431 U.S. 651, 662 & n.8 (1977). Petitioner attempts to avail himself of this exception to the general rule against interlocutory appeals by casting his challenge to the denial of his acquittal motion in double jeopardy terms. But that avenue of appeal is closed to petitioner because he never moved to dismiss the indictment on double jeopardy grounds. To the contrary, he moved for a new trial and the district court granted his motion.

Even if petitioner's motion for judgment of acquittal could be viewed as a motion to dismiss on double jeopardy grounds, petitioner would not have a colorable double jeopardy claim entitling him to interlocutory review. In *Richardson* v. *United States*, 468 U.S. 317 (1984), the defendant sought review of the denial of his motion for a judgment of acquittal following the declaration of a mistrial due to a hung jury. He argued that the Double Jeopardy Clause barred a retrial if there was insufficient evidence to convict at the first trial. In rejecting that claim, the Court made clear that "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." 468 U.S. at 325. The Court then concluded that "[r]egardless of the sufficiency of the evidence at [the] first trial, [the defendant] ha[d] no valid double jeopardy claim"

because "a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy." *Id.* at 326. The Court added that "[i]t follows logically from our holding today that claims of double jeopardy such as petitioner's are no longer 'colorable' double jeopardy claims which may be appealed before final judgment." *Id.* at 326 n.6. See also *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294, 304-313 (1984) (under Massachusetts' two-tier system of trial courts, a defendant's retrial *de novo* without any judicial determination of the sufficiency of the evidence at his prior bench trial does not violate the Double Jeopardy Clause).

Petitioner filed a motion for a new trial and the district court granted that motion. Petitioner's position is thus no different for purposes of the Double Jeopardy Clause from that of a defendant who faces a new trial because the jury failed to reach a verdict; both defendants are subject to continuing jeopardy. In light of *Richardson*, petitioner's retrial would not violate the Double Jeopardy Clause even if the evidence at the first trial was insufficient to support his convictions. Accordingly, petitioner does not have a colorable double jeopardy claim entitling him to immediate appellate review.

The Tenth Circuit's decision in *United States* v. *Wood*, 958 F.2d 963 (1992), is directly on point. In *Wood*, as in this case, the district court, following a guilty verdict, denied the defendant's motion for judgment of acquittal but granted his motion for new trial. Like petitioner, the defendant took an interlocutory appeal, arguing that retrial was barred by the Double Jeopardy Clause because of the insufficiency

of the evidence. The court of appeals, relying on *Richardson*, held that the defendant had no cognizable double jeopardy claim. 958 F.2d at 968-971. Although the court denied the government's motion to dismiss the defendant's appeal for lack of jurisdiction, it went on to state that "[o]ur resolution of the merits of Defendant's claims makes future double jeopardy claims like Defendant's non-colorable and, therefore, subject to summary dismissal when asserted on an interlocutory appeal." *Id.* at 972 n.12.

Petitioner's reliance on *United States* v. *Szado*, 912 F.2d 390 (9th Cir. 1990), does not help him. In that case, the district court reversed the defendant's conviction before a magistrate because the defendant had been denied the right to a jury trial. The court declined, however, to address the defendant's claim that the evidence was insufficient to support his conviction. The defendant took an appeal to the Ninth Circuit, arguing that the district court's failure to decide whether the evidence was sufficient compromised his double jeopardy rights, since a finding of evidentiary insufficiency would have precluded a retrial. In these circumstances, the court of appeals held that it had jurisdiction under the collateral order doctrine, 912 F.2d at 391-393, and that the district court should have reviewed the defendant's challenge to the sufficiency of the evidence, *id.* at 393-394.

Szado differs significantly from this case. In the first place, Szado's appeal, unlike petitioner's, was not from the denial of an acquittal motion; it was from the denial of a motion for reconsideration raising a double jeopardy claim. 912 F.2d at 391. Moreover, in *Szado* the district court declined to address the defendant's

challenge to the sufficiency of the evidence instead of rejecting it, as the district court rejected petitioner's challenge here. As a result, the defendant in *Szado* had a colorable double jeopardy claim in light of Ninth Circuit decisions holding that, when a defendant asserts a claim of evidentiary insufficiency on appeal, the claim must be reviewed even if there are other grounds for reversal. See *id.* at 393. If the district court in *Szado* had addressed and rejected the defendant's insufficiency of the evidence claim, *Richardson* would have prohibited the court of appeals from reviewing it on appeal because of the pendency of the new trial.

Nor is petitioner helped by *United States* v. *Greene*, 834 F.2d 86 (4th Cir. 1987), on which he also relies. There, as here, the district court simultaneously denied the defendant's post-trial motion for a judgment of acquittal and granted his motion for a new trial. After holding that it had jurisdiction to review the defendant's double jeopardy challenge to the retrial, which rested on the alleged insufficiency of the evidence at the first trial, the court went on to review the evidence and to find it sufficient. 834 F.2d at 89. In so doing, however, the court did not consider whether the defendant had a cognizable double jeopardy claim nor did it even mention *Richardson*.

We doubt that the *Greene* court's willingness to review the sufficiency of the evidence would survive a consideration of *Richardson*. In any event, *Greene* should not be construed as rejecting an argument—that *Richardson* precluded interlocutory review of the defendant's double jeopardy claim—that was neither raised by the government, see 834 F.2d at 87,

nor addressed by the court of appeals. Moreover, the *Greene* court premised its jurisdictional holding not on the denial of the defendant's motion for a judgment of acquittal, but on the denial of his motion to dismiss the indictment on double jeopardy grounds. 834 F.2d at 89. As discussed above, there was no such motion in this case.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

DECEMBER 1992

---

* Petitioner argues (Pet. 24-25) that the court of appeals' action put him in a worse position than "the person whose post-trial motions are wrongly denied in their entirety," since such a person "can raise both claims on direct appeal after sentencing and is then entitled to have the sufficiency issue decided first." It was petitioner himself, however, who chose to ask the district court to order a new trial. Had petitioner not made that request, he could have raised both his challenge to the sufficiency of the evidence and his challenge to the jury instructions on direct appeal.